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IN THE SUPREME COURT
OF THE STATE OF UTAH

* * * * *

SAVERY L. NASH,

Appellant,

vs.

CRAIGCO, INC., a Utah cor-
poration, CRAIG A. KNIGHT
and CATHY KNIGHT,

Respondents.

APPEAL BRIEF OF RESPONDENTS

CASE NO. 15216

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY

THE HONORABLE G. HAL TAYLOR, JUDGE

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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SAVERY L. NASH,

Appellant,

vs.

CRAIGCO, INC., a Utah corporation,
CRAIG A. KNIGHT
and CATHY KNIGHT,

Respondents.

APPEAL BRIEF OF RESPONDENT

CASE NO. 15216

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE HONORABLE G. HAL TAYLOR, PRESIDING

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* * * * *

I. NATURE OF THE CASE

This is an appeal from a directed verdict in favor of defendant on the issue of whether punitive damages should be awarded in a suit to rescind an issuance of corporate stock.

II. DISPOSITION IN LOWER COURT

In a jury trial, the Trial Court granted appellant's motion for a directed verdict rescinding the stock issuance of which appellant complained, but also granted defendant's motion for a directed verdict on the issue of whether punitive damages could be recovered against Defendant-Respondent Craig A. Knight.

III. NATURE OF RELIEF SOUGHT ON APPEAL

Respondent asks this Court to affirm the Trial Court's directed verdict refusing to permit the jury to consider the issue of punitive damages.

IV. STATEMENT OF FACTS

Respondent considers appellant's statement of facts to be inaccurate and incomplete and, as to certain key statements, unsupported by the record. Respondent submits, therefore, the following summary of those facts material to the punitive damages issue.

Plaintiff Savery L. Nash and Defendant Craig A. Knight entered into a series of oral agreements between December of 1974 and March of 1975. (Record 3-4, Transcript of Hearing held July 13 and 14, 1976, pages 11-12.) The parties started a housing development, named Fox Hills, and formed a corporation, Craigco, Inc., (Exhibit 7) which came to own the Fox Hills project (Exhibit 1, Tr. 12-19). Plaintiff Nash claimed that the agreement between the parties gave him control of Craigco, Inc. (Record 2 (paragraph 6); Transcript of Hearing held July 13 and 14, 1976, page 21), and that because he did not want to appear as the record holder of a majority of Craigco's stock, he took an option on 501 of Craigco's 1,000 shares of stock (Transcript of Hearing held July 13 and 14, 1976, page 23, page 107). Plaintiff Nash alleged that he had performed his obligations under the agreement which he claimed gave him the right to control Craigco, Inc.; in particular that he had pursued and obtained financing for the project (Record 3, paragraph 7 of Plaintiff's Complaint).

Defendant Knight denied that Plaintiff Nash had performed his part of the agreement or agreements between the parties, and especially denied that Mr. Nash provided financing for the building project as he agreed to do. (Record 27-28, paragraphs 5 and 6 Affidavit in Opposition to Motion for Temporary Restraining Order; Record 59-60, paragraph 5 of Second Defense and full text of Third Defense; Tr. 5-9).

At trial, Plaintiff Nash claimed that he agreed only to locate sources of financing (Transcript of Hearing held July 13 and 14, 1976, pages 86-89); while Defendant Knight claimed that Mr. Nash had promised to provide the necessary financing, and that Mr. Nash had represented that he had ample financial assets because he owned two insurance companies (Tr. 80, 5, 29) which Nash had valued at \$516,000 on his financial statement (Exhibit 55).

Plaintiff claimed that he performed his part of the agreement by arranging for Craigco to obtain "front end money" by entering into a limited partnership (Transcript of Hearing held July 13 and 14, 1976, pages 12, 27, 20). Defendant Knight claimed that the agreement between the parties called for plaintiff to provide the funds necessary to finance the project in return for obtaining control of Craigco, Inc., and claimed that plaintiff breached this agreement when, in order to get the necessary financing, he arranged for Craigco to enter a limited

partnership under terms which required Craigco to pay approximately \$55,000 to a corporation apparently wholly owned by Plaintiff Nash (Antlers, Inc.) and to a personal friend of Mr. Nash's in return for loans totalling \$30,000. (Tr. 7, 28, 34-35; Exhibit 65 at page 5).

Defendant Knight also claimed that plaintiff breached the agreement at issue by failing to provide those legal and negotiating services which he agreed would be part of his contribution to the partnership. (Tr. 22-25, 28, 31-34).

Mr. Knight consulted an attorney and reviewed his obligations and duties to Mr. Nash and to Craigco, Inc., and at the suggestion of his attorney, elected to transfer to the corporation a piece of real property which he and his wife owned in return for 14,700 shares of additional stock. (Tr. 36-37). Plaintiff Nash was informed of this issuance, and of Mr. Knight's reasons for deciding that Mr. Nash was not entitled to assume control of the corporation. (Exhibit 46).

Mr. Nash then brought this suit to set aside the issuance of the additional shares of stock, and to require transfer to him of sufficient stock to give him voting control of Craigco Inc. The Trial Court declined to submit to the jury the question of whether Mr. Nash had performed his part of the oral agreement or agreements between himself and Mr. Knight. The Trial Court apparently based its ruling on the fact that the company's books

indicated that at the time the additional stock was issued, the reduction thus caused in the value of Mr. Nash's interest in Craigco was disproportionate to the value of the property transferred to Craigco in return for the additional stock. (Tr. 16-23 [Second portion of transcript]).

After subsequent motions and hearings on the form of relief which should be ordered, the Trial Court entered judgment ordering Defendant Knight to rescind the issuance of the additional stock, to convey to Plaintiff Nash 501 shares of the remaining 1,000 shares of Craigco's stock, and denying Plaintiff Nash's claim for punitive damages. (Record 252-53).

V. ARGUMENT

1. THE TRIAL COURT CORRECTLY RULED THERE WAS NO EVIDENCE FROM WHICH THE JURY COULD FIND THAT DEFENDANT CRAIG A. KNIGHT ACTED MALICIOUSLY IN ISSUING ADDITIONAL SHARES OF STOCK IN CRAIGCO, INC.

The evidence in this case shows that Defendant Knight's action in issuing additional shares of stock was based on a good faith claim that Plaintiff Nash had breached the agreement or agreements under which Mr. Nash claimed the right to take control of Craigco, Inc. This action was taken on the advice of counsel, and was communicated to Plaintiff Nash under circumstances which permitted him to challenge Mr. Knight's actions by filing this suit less than two months after the issuance of the extra stock. (Record 26-27, Record 6). The issuance of the additional stock,

even though now adjudged a wrongful act, is not a sufficient basis to award punitive damages. Amoss v. Broadbent, 30 U.2d 165, 514 P.2d 1284 (1973). In the Amoss case, the trial court permitted an award of compensatory damages based on the jury having found that defendant had converted some cattle belonging to plaintiff. The Amoss trial court also permitted the jury to award punitive damages based on defendant's act of converting the cattle. This Court affirmed the award of compensatory damages based on the conversion, but reversed the award of punitive damages on the ground that, although the record showed that the defendant had behaved in a somewhat high handed way, the record also showed that defendant had acted under a claim of right. Having acted under a claim of right, albeit a claim which later was held to be unfounded, the defendant's conduct was held to be inconsistent, as a matter of law, with the kind of wanton or malicious conduct required to sustain an award of punitive damages.

The case of Kesler v. Rogers, 542 P.2d 354 (1975) held that punitive damages could be awarded where the evidence "was so substantial and persuasive that it could hardly be open to doubt...." That the defendant knew at the time he acted (also to take possession of some cattle) that he had no good faith claim to the cattle. In Kesler, this finding was predicated primarily on the fact that the defendant had represented that he owned the

brand which was on the cattle in question. It was readily determined that defendant owned no such brand, and the jury also answered interrogatories finding that defendant had knowledge, before the acts complained of, that he had no good faith claim to ownership of the cattle. 542 P.2d at 358-359.

The Kesler case does not purport to overrule the Amoss opinion of two years earlier, so it would appear that the two cases should be construed in a harmonious way. The synthesis which results from reading the two cases together appears to be that unless the evidence compels the conclusion that the claim of right is made fraudulently or in bad faith, action taken pursuant to a claim of right cannot be the basis for punitive damages. This interpretation is consistent with the comment in the Kesler opinion to the effect that punitive damages are an extraordinary remedy which should be applied with caution. 524 P.2d at 359.

Appellant contends at three different places in his brief that Mr. Knight's testimony which appears at lines 13 and 14 of page 61 of the transcript establishes without question the proposition that Defendant Knight knew when he issued the additional stock that the issuance would be set aside. This contention is not supported by the record. In the testimony upon which appellant relies so heavily and exclusively, Mr. Knight said [quoting his attorney]:

- A. He said, "It appears like Mr. Nash has provided certain legal work. And he

has provided certain financial assistance even though it seems to be less than agreed upon," and that the outcome of my stock transfer would no doubt yield to a lawsuit.

This response is at least as consistent with the hypothesis that Mr. Knight was saying only that he was advised that an issuance would lead to, or result in, a lawsuit as it is with appellant's hypothesis that it establishes with certainty the proposition that Mr. Knight was told that there was no doubt he would lose any suit brought to challenge the issuance. There is no doubt that Mr. Knight feared that Mr. Nash was predisposed to sue him (Tr. 60, lines 8-12), but lines 11-13 of the very passage on which appellant relies so strongly states that Mr. Knight's attorney was advising him that the financial assistance actually provided by Mr. Nash seemed to be less than what was agreed upon. Read as a whole, the pleadings and the transcript simply do not support the conclusion that Defendant Knight knew at the time of the stock issue that he had no good faith claim that appellant had breached his oral agreement or agreements with defendant.

It also seems significant that it was Mr. Nash who approached Defendant Knight and suggested going into business together. (Transcript of Hearing held July 13 and 14, 1976, page 10). Mr. Nash was at that time an attorney with some seven years of corporate practice (Transcript of Hearing held July 13 and 14, 1976, pages 10 and 81). Despite this background, Mr. Nash elected to use an oral agreement, or a series of oral agreements, to enter into business with Mr. Knight. If Mr. Nash had been concerned

to eliminate questions about what he needed to do in order to enjoy the benefits of the controlling position into which he placed himself, he was uniquely well qualified to do so. Having chosen to leave his duties open to the conflicting interpretations which should be expected of oral agreements, it seems singularly inappropriate for Mr. Nash to contend that the Court should readily conclude that Mr. Knight lacked a good faith basis for his claim that Mr. Nash had forfeited his right to control of Craigco, Inc.

Appellant presents extensive citations to the effect that Defendant Knight was in a position in which he had certain fiduciary obligations to appellant. Appellant then cites Holland v. Moreton, 10 U.2d 390, 353 P.2d 989 (1960), as if that case imposes a different standard for punitive damages where fiduciary duties may be held to exist between the parties. Holland v. Moreton states no such rule. The Holland opinion states expressly that in a case involving claimed breach of fiduciary duty, there must be found both a breach of such duty, together with conduct malicious in nature. The Holland opinion shows that fiduciary duty cases are also subject to the rule stated in Powers v. Taylor, 14 U.2d 152, 379 P.2d 380 (1963):

"Whether [punitive] damages are awardable is not dependent upon the classification of the act, nor upon the nature of the injury, but upon the manner and intent with which it is done." 14 U.2d at 155.

Measured from the position and perception of Defendant Knight, as of the time he decided to issue additional stock, appellant's rights were restricted to those derived from oral agreements which apparently established either a partnership or joint venture, and which Defendant Knight claimed had been breached, and to those derived from an option to purchase corporate stock. These circumstances were inherently ripe with possibility for dispute as to whether fiduciary duties still existed between Knight and Nash. Defendant Knight was advised that his fiduciary duty to Mr. Nash would be discharged by informing Nash of the share issuance, and that was done within a month of the issuance. (Tr. 60, Exhibit 46).

Appellant does not make a showing that the record contains significant evidence to support the conclusion that Defendant Knight acted with malice. On the contrary, the record shows that Mr. Knight believed that appellant had not complied with the agreement which gave rise to his having an option to acquire control of Craigco, Inc. (Tr. 62). He was afraid that if he did not act to retain control of the corporation, appellant would take control, leaving Defendant Knight personally obligated to guarantee the corporation's extensive loans. (Tr. 66, 75-76). Mr. Knight sought the advice of counsel and elected to follow one of the courses of action suggested to him by counsel. (Tr. 36). Under these circumstances, the Trial Court correctly ruled

(See court's remarks, Tr., second section, at page 12) that punitive damages were not allowable.

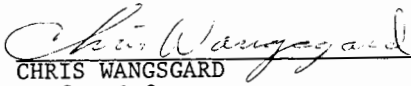
2. THIS TRIAL COURT PROPERLY HELD THAT UNDER UTAH LAW PUNITIVE DAMAGES ARE NOT ALLOWABLE IN THE ABSENCE OF ACTUAL DAMAGES.

Appellant states that the Utah Supreme Court has not ruled on this issue, and suggests that the Idaho case of Village of Peck v. Denison, 92 Ida. 747, 450 P.2d 310 (1969) be regarded as applicable to the issues raised on this appeal. This argument ignores the existence of Maw v. Weber Basin Water Conservancy District, 20 U.2d 195, 436 P.2d 230 (1968) which holds that punitive damages may not be awarded in the absence of compensatory damages.

VI. CONCLUSION

The Trial Court ruled correctly that punitive damages were not allowable in this case. This ruling was in accord with the Utah law on this issue, and, more fundamentally, correctly reflected those conclusions which could properly be drawn from the evidence presented.

RESPECTFULLY SUBMITTED this 30th day of January.


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CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed a true and correct copy of the foregoing Appeal Brief in Case No. 15216, postage prepaid, this 24th day of January, 1978, to David S. Dolowitz, Attorney for Appellant, at P. O. Box 11898, Salt Lake City, Utah 84147.

Chris Wingard